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No. 71-724

In the Supreme Court of the United States

OCTOBER TERM, 1971

MARTIN SKLAROFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Southern District of Florida, petitioner and one Kane were convicted of having used interstate facilities to carry on an illegal gambling business, in violation of 18 U.S.C. 1952, and of having conspired to violate that statute and 18 U.S.C. 1084 (punishing transmission of wagers by a wire facility in interstate commerce), in violation of 18 U.S.C. 371. Petitioner was sentenced to concurrent prison terms of two years. The court of appeals affirmed (Pet. App. A 1-17).

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Petitioner contends that the trial court erred in receiving into evidence certain items (see Pet. 5) which had been obtained pursuant to search warrants issued with respect to violations of the wagering tax statutes. Subsequent to the search, this Court held that the timely claim of the privilege against self-incrimination was a complete defense to a prosecution for failure to comply with those statutes. See *Marchetti* v. *United States*, 390 U.S. 39 and *Grosso* v. *United States*, 390 U.S. 62. In this case, the court of appeals sustained the admissibility of the seized items (Pet. App. A 16–17), relying upon its opinion in *United States* v. *Scaglione*, 446 F. 2d 182 (C.A. 5), certiorari denied, November 9, 1971 (No. 71–370), holding that *Marchetti* and *Grosso* do not retroactively invalidate search warrants issued for violations of these provisions. The ruling below is in accord with the decisions of all the federal courts of appeals which have been confronted with the issue. The cases hold that in prosecutions other than for violation of the wagering tax statutes, evidence obtained under search warrants based on wagering tax violations prior to *Marchetti* and *Grosso* is admissible, since the wagering tax statutes are not invalid and, when made, the searches were clearly lawful under then settled law. *Eg., United States* v. *Armiento*, 445 F. 2d 869 (C.A. 2) and cases cited, certiorari denied, *sub nom. Jernek* v. *United States*, October 12, 1971 (No. 71–72); *United States* v. *Hanon*, 428 F. 2d 101

(C.A. 8) (*en banc*), certiorari denied, 402 U.S. 952;[1] see *Mackey* v. *United States*, 401 U.S. 667 (opinion of Mr. Justice White).

Petitioner's contention that the trial judge erred in the manner in which he conducted the hearing on remand to determine whether the conviction had been tainted by illegal electronic surveillance is thoroughly answered in the opinion below upon which we rely (Pet. App. A 1–10).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1971.

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[1] Petitioner's reliance (Pet. 7) on *United States* v. *Lookretis*, 398 F. 2d 64 (C.A. 7) is misplaced. That case did not involve a challenge to a search warrant but to the introduction of evidence from the wagering tax form in a proceeding under other statutes dealing with interstate gambling. Moreover, *Lookretis* has seemingly been superseded by the Seventh Circuit in *Zizzo* v. *United States*, 447 F. 2d 857 (C.A. 7), petition for a writ of certiorari pending, No. 71–594, this Term. Here, as the court of appeals pointed out (Pet. App. A 16–17), no similar evidence was introduced; rather in addition to the items seized under the warrant the government introduced petitioner's *income tax* returns—which hardly can be said to have been coerced in violation of the Fifth Amendment privilege, *United States* v. *Sullivan*, 274 U.S. 259—to show that a major source of petitioner's income came from gambling.

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